63 FLRA No. 189

UNITED STATES DEPARTMENT OF THE AIR FORCE
62nd AIRLIFT WING
MCCHORD AIR FORCE BASE, WASHINGTON
(Respondent/Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1501, AFL-CIO
(Charging Party/Union)

SF-CA-07-0350

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DECISION AND ORDER

August 14, 2009

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Before the Authority: Carol Waller Pope, Chairman and

Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on an exception to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent and a cross-exception filed by the General Counsel (GC). The Respondent filed an opposition to the cross-exception.

The complaint alleges that the Respondent violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) when it told an employee (the employee), who was represented by the Union, that the disciplinary action imposed on him might have been less severe had the employee prepared his own written response. Judge's Decision (Decision) at 2. The Judge found that the Respondent violated the Statute, as alleged.

For the reasons that follow, we conclude, in agreement with the Judge, that the Respondent violated the Statute.

II. Background and Judge's Decision

A. Factual Background

The facts are fully set out in the Judge's decision and are only summarized here. The employee's supervisor (the supervisor) served the employee with a notice of a proposed five-day suspension. Decision at 2. The employee sought the representation of a Union steward (representative), who prepared a written response and submitted it to the supervisor. *Id*. at 2-3. The supervisor refused the representative's efforts to arrange an oral response to the proposed suspension, indicating that he had read the written response and "that there was nothing more to discuss." *Id*.

At a subsequent meeting, the supervisor notified the employee and the representative of his decision to suspend the employee for three days. *Id*. The employee, supervisor, and representative provided conflicting testimony regarding the supervisor's explanation of his decision. The employee testified that the supervisor stated he had to deal with the employee "more harshly" than if the employee had written the response himself. *Id*. The supervisor testified that he explained that a lack of contrition in the written response precluded lesser discipline. *Id*. The representative testified that the supervisor explained to the employee that "things would have [been] easier on [the employee]" had he written his own response. *Id*. at 4

The employee, through the representative, filed a grievance over his three-day suspension, which set forth his grievance as follows:

> I received a 3 day suspension for alleged dereliction of duty on
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> November 7, 2006. My supervisor refused to accept my oral reply
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> in addition to my written response to the proposed suspense with my
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> representative. With in his letter to suspend, he stated I omitted facts
>
> and accepted no responsibility, . . . I just believe the punishment is more
>
> harsh than required to correct my mistake.
>
> Also, the comments my supervisor made to me were coercive
>
> and anti-union.

Id. at 6. The grievance alleged that the Respondent violated Article 6, Section 3 [1] of the collective bargaining agreement. *Id*.

1. Article 6, Section 3 provides that "[t]he Union and the Employer agree to recognize the principle of partnership and work within its ideology." Exhibit R-7 at 6.

During a meeting held at Step 1 of the grievance procedure, the supervisor attempted to clarify the scope of the grievance and the meaning of the last quoted sentence of the grievance. *Id*. The representative explained that the sentence regarding the supervisor's allegedly "coercive and anti-union" comments would be handled as a "separate matter." *Id*. The Respondent's responses at Steps 1 and 2 of the grievance procedure made no mention of the supervisor's comments. *Id*. at 7. The Respondent's Step 3 response specifically stated that the disputed comments would not be addressed in the grievance process because they concerned an "apparent dispute between the government and the union" and would more appropriately be dealt with separately. *Id*. at 7. The Union did not invoke arbitration over the grievance. *Id*. at 8.

Subsequently, the Union filed an unfair labor practice charge alleging that the Respondent violated § 7116(a)(1) of the Statute by telling the employee that the discipline being imposed might have been less severe had he prepared his response without the involvement of the Union. *Id*. at 1-2. In response, the Respondent filed a motion to dismiss the unfair labor practice (ULP) charge, contending that it is barred by § 7116(d) [2] of the Statute because the factual predicate and legal theories for the ULP are the same as those for the grievance. *Id*. The General Counsel opposed the motion to dismiss, contending that the ULP charge is not barred by § 7116(d) because the grievance and ULP do not involve the same aggrieved party and are not based on the same legal theory. *Id*. at 9.

B. The Judge's Decision

The issues before the Judge were whether he had jurisdiction and, if so, whether the supervisor's comments violated § 7116(a) (1) of the Statute.

On the jurisdictional issue, the Judge found that the record provided a "compelling case" that the supervisor's comments constituted a factual predicate shared by the grievance and the ULP. *Id*. at 9. However, the Judge, citing the Supreme Court's decision in *Cornelius v. Nutt*, 472 U.S. 648 (1985), noted that one factual predicate can give rise to more than one aggrieved party. *Id*. The Judge concluded that the Union filed the grievance on behalf of the employee for the disciplinary action, and then filed the ULP on its own behalf to protect its institutional interest in exercising its representational responsibilities. *Id*. at 11-12. Although the Judge questioned whether Article 6, Section 3 of the collective bargaining agreement was the most appropriate provision for raising an individual grievance regarding a disciplinary action, [3] the Judge found it clear from the conduct of the parties that the grievance addressed only the employee's disciplinary action, and not the supervisor's comments. *Id*. Citing Authority precedent as well as the Respondent's response at Step 3 of the grievance process that the grievance did not involve the dispute over the supervisor's comments, the Judge concluded that the ULP was not barred by the earlier-filed grievance because the two procedures involved different aggrieved parties. *Id*. at 10-13.

Having concluded that he had jurisdiction, the Judge next addressed the question of whether the supervisor's comments violated § 7116(a)(1) of the Statute. In resolving the conflicting testimony regarding what the supervisor said, the Judge concluded that the testimony of the representative was the most reliable. *Id*. at 4. Accordingly, the Judge found that the supervisor told the employee that "things would have [been] easier on [the employee]" if he had written his own response to the proposed discipline. *Id*. The Judge concluded that these comments could reasonably be viewed as interfering with, coercing or restraining a bargaining unit member's right to representation and the union's right to represent him. *Id*. at 13-14. Therefore, the Judge found that a preponderance of the evidence established that the supervisor violated § 7116(a)(1) of the Statute.

III. Positions of the Parties

A. Respondent's Exception

The Respondent contends that the Judge erred when he found that the ULP charge is not barred by § 7116(d) of the Statute. In this regard, the Respondent contends that the rights raised in both the grievance and ULP are the employee's individual rights rather than the Union's institutional rights. Exceptions at 7. The Respondent also contends that the supervisor's comments were raised in both actions, which share, as the

2. Section 7116(d) provides, in relevant part, that:

> [I]ssues which can be raised under a grievance procedure may, in the
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> discretion of the aggrieved party, be raised under the grievance procedure
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> or as an unfair labor practice under this section, but not under both
>
> procedures.

3. The Judge noted that Article 15 of the agreement, unlike Article 6, Section 3, specifically covers disciplinary actions, including penalties and the right to an oral reply. Decision at 11 n.2.

same legal predicate, an alleged violation of an employee's rights under § 7116(a)(1). *Id*. at 8-9.

B. General Counsel's Cross-Exception

The General Counsel contends that the Judge properly determined that the employee was the aggrieved party in the grievance, and that the Union is the aggrieved party in the ULP. Cross-Exception at 4. However, the General Counsel takes exception to the Judge's failure to find also that the grievance and the ULP charge raise different legal theories and that, for this additional reason, the ULP is not barred by § 7116(d). In this regard, the General Counsel contends that the grievance alleged a violation of the collective bargaining agreement while the ULP alleges a violation of the Statute. *Id*. at 6.

C. Respondent's Opposition to the General Counsel's Cross-Exception

The Respondent contends that the grievance concerned two separate matters: the suspension and the supervisor's comments. Opposition at 4. In particular, the Respondent contends that the statement in the grievance concerning the supervisor's comments "intimates a violation of 5 U.S.C. § 7116(a)(1)." *Id*. at 4. The Respondent contends, therefore, that the grievance and ULP charge share one common legal predicate: alleged interference in violation of § 7116(a)(1) of the Statute. *Id*. at 3-4. Further, the Respondent, while acknowledging that the grievance alleged a violation of Article 6, Section 3 of the agreement, contends that Article 4, section 8.d. of the agreement would have been more applicable to the allegation regarding the supervisor's comments. [4] *Id*. at 6. According to the Respondent, the representative's failure to allege a violation of that provision is further support for the Respondent's argument that the grievance raised a statutory violation. *Id*.

IV. Analysis and Conclusions

Section 7116(d) of the Statute provides that issues that may be raised under a negotiated grievance procedure or as a ULP may, in the discretion of the aggrieved party, be raised under either procedure, but not under both procedures. *See*, *e.g*., *Dep't of Transp., Fed. Aviation Admin., Fort Worth, Tex.*, 55 FLRA 951, 953 (1999) (*FAA*). In order for a ULP charge to be barred under § 7116(d) by an earlier-filed grievance: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same. *See*, *e.g*., *United States Dep't of Veterans Affairs, Medical Ctr., N. Chicago, Ill.*, 52 FLRA 387, 392 (1996) (*VAMC, North Chicago*).

A. The Judge did not err in finding that the grievance and the ULP charge involve different aggrieved parties.

Contrary to the Respondent's claim, the record supports the Judge's findings that the Union, not the employee, is the aggrieved party in the ULP. In this regard, the Judge found, and the Respondent does not dispute, that the ULP charge and complaint seek no relief for the employee. *Id*. at 12. The Judge noted, in this regard, that the Respondent's brief provided no argument that the Union is not the aggrieved party in the ULP. *Id*.

As for the wording of the grievance, when the supervisor sought clarification of the reference to the supervisor's comments during the Step 1 meeting, the representative explained that the comments would be treated as a separate matter. Decision at 6. Subsequently, the Respondent's responses at Steps 1 and 2 made no reference to the comments and the Respondent's Step 3 response stated that the comments would not be addressed in the grievance procedure because they concerned a separate "dispute between the government and the union." Decision at 7. In circumstances such as these, it is appropriate to consider the actions of the parties and how those actions reflect the parties' understandings of the scope of the grievance. Here, those actions reflect that both parties understood that the issue regarding the supervisor's comments was not part of the grievance and that the dispute over those comments was to be treated separately.

The Respondent also claims that, as the ULP alleges a violation of § 7116(a)(1), it necessarily alleges a violation of the employee's individual right. Exceptions at 8. The Respondent is mistaken, however, because alleged violations of § 7116(a)(1) can pertain to interference with the rights of a union as well as of an individual. *See, e.g., United States Dep't of Def., Def. Contract Audit Agency, Northeastern Region, Lexington, Mass.*, 47 FLRA 1314, 1321 (1993) (alleged violation of § 7116(a)(1) based on individual right); *Dep't of Health and Human Services, SSA, Balt., Md.,* 43 FLRA 318 (1991) (alleged violation of § 7116(a)(1) based on union right).

4. Article 4, Section 8(d) of the agreement provides that "[n]o employee will be subjected to intimidation, coercion, harassment, or prohibited personnel practice." Exhibit R-7 at 5.

.As the Judge noted, the ULP charge and complaint seek no relief for the employee. Decision at 12. As the Judge noted further, the charge is not drawn, in any part, to allege a violation of the individual's rights regarding the disciplinary action brought against him. *Id.* Instead, the sole basis for the alleged violation of § 7116(a)(1) is the supervisor's comments regarding the employee's reliance on the representative in preparing the written response. Exhibit GC-1(b), paragraphs 11 and 12.

Based on the foregoing, we deny the Respondent's exception to the Judge's determination that the aggrieved parties in the ULP and the grievance are not the same.

B. The grievance and ULP charge have different legal predicates.

The determination of whether a ULP is barred by an earlier-filed grievance requires examining whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *United States Dep't of the Army, Army Finance & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991) (*Army Finance*), *petition for review denied sub nom. AFGE, AFL-CIO, Local 1411* v. FLRA, 960 F.2d 176, 177-78 (D.C. Cir. 1992). Only if both requirements are satisfied is a subsequent ULP charge barred by a former grievance. *OLAM Southwest Air Def. Sector (TAC) Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801-02 (1996) (*OLAM*) and cases cited therein.

It is undisputed that the ULP and the earlier-filed grievance arose from the same factual circumstances. However, they rest on different legal theories. Specifically, the issue in the grievance is whether the employees' suspension violated Article 6, Section 3 of the agreement while the ULP alleges that the supervisor's statements interfered with, restrained or coerced an employee in violation of § 7102 of the Statute. Decision at 1-2, 11. As the grievance alleges a violation of the contract while the ULP alleges a violation of the Statute, the legal theories are not the same. In this regard, the Authority has held, in a variety of circumstances, that a ULP alleging a violation of the Statute raises a sufficiently distinct theory from a grievance alleging a violation of a contract even when both matters arise from the same set of facts. *See, e.g. United States Dep't of Labor, Wash., D.C.*, 59 FLRA 112, 115 (2003), and cases cited therein. For example, in *VAMC, North Chicago*, the Authority found that a ULP charge alleging that the agency implemented a policy denying cash performance awards without providing the union with notice and an opportunity to bargain was not barred by a prior grievance alleging that the agency's denial of performance awards violated the collective bargaining agreement. 52 FLRA at 392-93. Similarly, in *AFGE, National Council of EEOC Locals, No. 216,* 49 FLRA 906, 914 (1994), the Authority found no bar where the ULP charge alleged retaliation against the grievant for her union activity, and the grievance contended that there was no support for her suspension. Likewise, in *OLAM*, the Authority found no bar where the grievance sought to establish preferential treatment of employees and the ULP sought to establish the agency's statutory failure to bargain over a change in working conditions. 51 FLRA at 803.

In its opposition, the Respondent contends that § 7116(d) bars the ULP because the grievance is based on a violation of the Statute. Opposition at 3-4. In this regard, the Respondent contends that the grievance's reference to the supervisor's "coercive and anti-union" comments "intimates a violation of 5 U.S.C. § 7116(a)(1)." *Id*. at 4. The Respondent contends further that the Union's failure to cite Article 4, Section 8(d) of the agreement, which would have directly addressed the supervisor's comments, further supports the argument that the grievance raised a statutory violation instead of contractual violation. *Id*. at 6.

The Respondent's contentions are without merit. As the Judge found, the parties' conduct during the grievance procedure indicates that the grievance involved only the disciplinary action and not the disputed comments. *See* Award at 11-12. Therefore, there was no reason for the Union to have cited a contractual provision addressing the comments. Moreover, even if the Union did not base the grievance on the contract provision most relevant to disciplinary actions, the fact remains that the grievance was expressly based on the contract. *See Dep't of Def., United States Army Reserve Personnel Command, St. Louis, Mo.*, 55 FLRA 1309, 1313, n.5 (ULP based on the Statute not barred by earlier-filed grievance based on a contract provision even if the contract provision is not a "plausible basis" for the grievance). As such, the grievance was based on a different legal theory from the ULP. [5]

5. For the same reason, the Authority rejects the Respondent's contention that after filing the grievance, the representative attempted to withdraw the statutory issue from the grievance. *See* Exceptions at 9-10. As discussed above, the Authority concludes that the grievance raised no statutory issue.

Based on the foregoing, we conclude that, even if the grievance and the ULP charge involve the same aggrieved party, they involve different legal theories.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the United States Department of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Washington, shall:

1. Cease and desist from:

(a) Making statements to employees in the bargaining unit represented by the American Federation of Government Employees, Local 1501, AFL-CIO (Union) that interfere with, restrain or coerce employees in the exercise of their rights under § 7102 of the Statute, which includes the right to be represented by the union without fear of penalty or reprisal.

(b) Interfering with, restraining or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at all facilities at McChord Air Force Base, Washington, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Commander of the 62nd Airlift Wing, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by any other material.

(b) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Washington, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify employees that:

WE WILL NOT make statements to employees in the bargaining unit represented by the American Federation of Government Employees, Local 1501, AFL- CIO (Union) that interfere with, restrain, or coerce employees in the exercise of their rights under § 7102 of the Federal Service Labor-Management Relations Statute, which includes the right to be represented by the union without fear of penalty or reprisal.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____

Department of the Air Force
62nd Airlift Wing
McChord Air Force Base, Washington

Dated: _____ By: _____ (Signature)
Commander, 62nd Airlift Wing

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: 415-356- 5000.